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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. NICKY FERNANDEZ, Defendant and Appellant.	F068554 (Super. Ct. No. MF10572A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Cory J. Woodward and Kenneth G. Pritchard, Judges.[†]

Sara E. Coppin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Clifford E. Zall, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Kane, J. and Smith, J.

[†] Judge Woodward ruled on appellant's suppression motion; Judge Pritchard presided over appellant's jury trial and sentenced appellant.

Nicky Fernandez was convicted of one count of possession of an inmate manufactured weapon or sharp instrument while incarcerated in a penal institution. The jury also found true the allegation that Fernandez had suffered a prior strike conviction.

Fernandez asserts the trial court erred when it denied his motion to suppress incriminating statements made by him before he was advised of his constitutional rights as set forth in *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Furthermore, according to Fernandez, the weapon secreted in his waist should have been suppressed as well.

We conclude that even if the trial court erred in admitting Fernandez's statement, the weapon would have been inevitably discovered and was therefore admissible. Furthermore, the statement made by Fernandez, if erroneously admitted, was harmless under any standard of review considering the overwhelming evidence of his guilt. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

The Information

The information contained a single count charging Fernandez with possession of an inmate manufactured weapon or sharp instrument while confined within a penal institution. (Pen. Code, § 4502, subd. (a).)[1] The only enhancement alleged was that Fernandez had suffered a prior conviction that constituted a strike within the meaning of section 667, subdivisions (b)–(i).

The Evidence

Correctional officer Donald B. Smith was employed at California Correctional Institute, Tehachapi. Fernandez was an inmate at CCI-Tehachapi. On the day in question, Fernandez was on his way to a noncontact visit with a civilian when, at Smith's request, Fernandez was escorted into a holding cell. Smith and his partner, correctional

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1 All statutory references are to the Penal Code unless otherwise stated.

officer Frye, were in the room. Fernandez was escorted by two correctional officers, so when he arrived there were four correctional officers and Fernandez in the room.

When Fernandez arrived, Frye ordered him to his knees, and asked Fernandez if he had any contraband on him. At trial, Smith defined contraband as anything an inmate is not supposed to have on his person, including books, pens, weapons, etc. Fernandez responded that he had a weapon in his underwear, an answer that surprised Smith.

Smith searched Fernandez, eventually recovering from his underwear a flat piece of metal, approximately six and one-quarter inches long, three-quarters of an inch wide, and one-eighth of an inch thick. The metal was sharpened to a point on one end, and was flat on the other end. The weapon was in between two pieces of fabric in the boxer shorts worn by Fernandez.

Correctional officer David Yubeta escorted Fernandez to the holding cell on the day in question. When Fernandez entered the room, officer Frye ordered him to kneel down. Once Fernandez had knelt down, Yubeta and his partner, correctional officer Flores, maintained control of Fernandez by holding his biceps. Fernandez's hands were handcuffed behind his back. It was at this point that Frye asked Fernandez about contraband.

Correctional Lieutenant Joshua Tyree testified that the object found in Fernandez's possession was "a very good stabbing weapon for a prison."

Arguments and Verdict

The People argued the evidence was clear and uncontradicted, that Fernandez was an inmate at a correctional institution when he was found in possession of a stabbing weapon. Defense counsel argued the item found on Fernandez was not a stabbing weapon as that term is used in the statute, but instead was a precursor to a stabbing weapon. As such, the jury must find Fernandez not guilty.

The jury found Fernandez guilty. The jury also found true the prior conviction enhancement after a bifurcated trial on that issue. The trial court struck the prior

conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, and then sentenced Fernandez to a consecutive middle term of three years.

DISCUSSION

Fernandez argues he was in custody when Frye asked him if he had any contraband on his person. Since he was not informed of his rights pursuant to *Miranda*, Fernandez asserts his response that he had a weapon in his waistband should have been excluded from evidence. He asserts the trial court erred when it denied his pretrial motion to suppress this statement. He concludes by arguing that because the statement was illegally obtained, the weapon itself should have been suppressed as "'fruit of the poisonous tree.'"

In *Miranda* the Supreme Court held the prosecution may not use statements stemming from a custodial interrogation unless the witness had first been warned he had the right to remain silent, any statement made may be used as evidence against him, he has the right to the presence of an attorney, and an attorney will be appointed if he cannot afford one. (*Miranda, supra*, 384 U.S. at pp. 444, 479.)

In this case the evidence established that Fernandez was not advised of these rights before he was asked if he had any contraband on his person. The issue was whether this was a custodial interrogation. Fernandez recognizes he was in prison, and therefore his constitutional rights are substantially reduced, but contends that even a prisoner is entitled to a *Miranda* warning in the circumstances of this case.

Fernandez cites several cases to support his argument. In *Mathis v. United States* (1968) 391 U.S. 1, the defendant was in custody on a different matter when he was questioned about filing false tax returns. The Supreme Court concluded there is "nothing in the *Miranda* opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody." (*Id.* at pp. 4–5.)

In *People v. Macklem* (2007) 149 Cal.App.4th 674 (*Macklem*), Macklem was in custody for murder when he got into an altercation with a cellmate. A detective interviewed him about the altercation without providing a *Miranda* warning. Macklem moved to suppress his statements in the consolidated trial of the charges. The appellate court recognized it is difficult to determine whether a prisoner is "in 'custody'" for *Miranda* purposes because there are numerous restraints on his freedom of movement and action. (*Macklem*, *supra*, at pp. 686–687, 692.) The appellate court identified the issue as whether there were further limitations placed on the prisoner beyond that which is normally experienced (*id*. at p. 687), and recognized four criteria often utilized by the courts to answer this question: (1) was the language summoning the defendant from his prison lodging coercive, (2) were the physical surroundings of the questioning unduly coercive, (3) was the prisoner confronted with evidence of his or her guilt, and (4) was the prisoner given an opportunity to leave the area where he or she was questioned (*ibid.*).

We are required to independently consider the totality of the circumstances to determine whether Fernandez was subject to additional restraints that further restricted his freedom of movement. (*Macklem*, *supra*, 149 Cal.App.4th at p. 695.)

The Attorney General agrees with Fernandez that he was in custody for *Miranda* purposes. When the totality of the circumstances are considered, we are not certain this concession is proper. First, Fernandez was not summoned from his cell, but instead was being transported for a scheduled visit with a civilian. His hands were cuffed behind his back for transport, as is normal prison procedure. Smith's suspicions were aroused because in prior visits with this civilian, Fernandez and the civilian were observed holding notes to the glass separating the two, thereby avoiding the recording equipment. Smith suspected Fernandez may be attempting to bring narcotics into the prison. Smith expected to find notes during the search. Fernandez was taken into a holding area, a room he would normally be held while awaiting the arrival of the civilian.

To this point, nothing had occurred that would require informing Fernandez of his *Miranda* rights. However, one could argue Fernandez was placed under greater restriction of his movement because he was ordered to his knees, and the two officers transporting him held his arms to control him. This point seems to be the basis of the Attorney General's concession.

However, Fernandez was going to be searched at this point regardless of his response to the question posed by Frye. The restraint was, it appears to us, to permit the search. Moreover, the question posed by Frye was not necessarily intended to elicit a response that would expose Fernandez to criminal prosecution. The contraband to which Frye referred included anything within the prison that would be in violation of prison rules, such as a pen and paper, and not only items that would result in a criminal prosecution. Indeed, Smith stated he was surprised when Fernandez stated he possessed a weapon, since he was not anticipating that response. Finally, unlike the cited cases, Fernandez was not being investigated for a crime that had already been committed, but instead was being searched for a possible prison rule violation. Each of these factors suggest that a *Miranda* warning was not required.

However, we need not decide whether Fernandez was in custody for *Miranda* purposes because, as the Attorney General correctly argues, even if the trial court erred in refusing to suppress Fernandez's statement, the weapon would have been admissible for two reasons. First, defense counsel never moved to suppress the weapon. His motion was directed solely to suppression of Fernandez's statement. Therefore, had the trial court granted the motion, the weapon would have been introduced, leading to Fernandez's conviction.

Second, even were we to assume defense counsel should have moved to suppress the weapon, and had the issue been presented to the trial court, the motion would have been denied because of the doctrine of inevitable discovery. "Under the inevitable discovery doctrine, illegally seized evidence may be used where it would have been

discovered by the police through lawful means. As the United States Supreme Court has explained, the doctrine 'is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.' [Citation.] The purpose of the inevitable discovery rule is to prevent the setting aside of convictions that would have been obtained without police misconduct. [Citation.]" (*People v. Robles* (2000) 23 Cal.4th 789, 800.)

Smith's testimony was clear that Fernandez was going to be searched because his past behavior suggested to officers that he might have been carrying contraband. Although the issue was never raised in the trial court, it is impossible to imagine that a six-inch long piece of metal would not have been discovered during this search.[2]

We also reject Fernandez's claim that his statement which was not suppressed was highly prejudicial. His defense to the charges was that the item found was not a weapon, but only a precursor to a weapon. However, the only testimony on this subject was Tyree's testimony that the item would have made an excellent stabbing weapon. Moreover, Smith described the item as a flat piece of metal, approximately six and one-quarter inches long, three-quarters of an inch wide, and one-eighth of an inch thick. The metal was sharpened to a point on one end, and flat on the other end. Fernandez's statement merely admitted the obvious, and it is not possible under any standard of review that suppression of the statement would have allowed Fernandez to obtain a more favorable result.

DISPOSITION

The judgment is affirmed.

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[2] Fernandez's assertion of ineffective assistance of counsel must fail for this reason. Defense counsel's failure to move to suppress the weapon did not constitute ineffective assistance of counsel because the motion would have been denied. (*People v. Samayoa* (1997) 15 Cal.4th 795, 848.)